

P.E.R.C. NO. 88-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY SPECIAL
SERVICES SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CI-87-22-82

WALTER POLITZER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Bergen County Special Services School District violated the New Jersey Employer-Employee Relations Act when it did not offer Walter Politzer full-time employment in retaliation for his union activity.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY SPECIAL
SERVICES SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CI-87-22-82

WALTER POLITZER,

Charging Party.

Appearances:

For the Respondent, Gruen & Ritvo, Esqs.
(Charles A. Gruen, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman,
LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

DECISION

On October 3 and December 11, 1986, Walter Politzer filed an unfair practice charge and amended charge against the Bergen County Special Services School District ("District"). The charge, as amended, alleges that the District violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),^{1/} when it did not

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

renew his employment contract for the 1986-87 school year. He alleges that the nonrenewal was in retaliation for his role in negotiations between the District and his majority representative, the Bergen County Special Services School District Education Association ("Association").

On January 12, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On January 26, 1987, the District filed an Answer. It admitted that it did not renew Politzer's contract but denied that the non-renewal was motivated by his Association activities.

On May 13 and June 11, 1987, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. After Politzer presented his case, the District moved to dismiss the Complaint. The Hearing Examiner denied the motion. The parties filed post-hearing briefs by September 4, 1987.

On September 30, 1987, the Hearing Examiner issued his report recommending the Complaint be dismissed. H.E. No. 88-16, 13 NJPER ____ (¶ ____ 1987). He concluded that, while Politzer had proved that his protected activity was a substantial or motivating factor in the non-renewal, the District had proved that it would not have renewed his contract even absent his protected activity.

On October 13, 1987, Politzer filed exceptions. He asserts that the District did not demonstrate that it would not have renewed his contract absent his protected conduct. He claims that the timing of the non-renewal, the disparate application of criteria in

hiring decisions, and the comparative lack of qualifications of an employee hired demonstrate that the asserted reasons for not renewing Politzer were pretextual.

The Hearing Examiner's findings of fact (pp. 3-13) are generally accurate. We adopt them with these modifications.

We modify findings 6, 11 and 12 to indicate that the District and Association began preparing for negotiations in October or November 1984. Their first negotiations session was in February 1985 and their last, with a fact-finder, in February 1986. Press' testimony that negotiations were long and hostile was contradicted by Kringle, who did not detect any animosity. Kringle, however, was not involved in the meetings between Politzer, Press, the neutrals and Gruen, the Board's negotiator. Press' testimony was corroborated by Politzer and Biondi and we credit it and conclude that negotiations were long, difficult and, at times, hostile.

We add to finding 8 that an important issue in negotiations was tenure for part-time employees. The District initially refused but eventually agreed to grant tenure to part-time employees having three years and one day experience. Under this provision, Politzer would have been tenured after teaching one school day in the 1986-87 year had he been retained as a part-time interpreter.

We modify finding 10 to indicate that the last negotiations session was attended by the fact-finder who was asked to clarify the parties' agreement on salary guide compression.

We add to finding 12 that Dwyer was not specifically told not to renew Politzer's contract.

We add to finding 18 that the District's enrollment uncertainties were due largely to the difficulty of predicting the number of out-of-district students who would enter the elementary program. Enrollment in the secondary program was more predictable because most students come from the elementary program. The only apparent change in the secondary program was the replacement of two part-time positions with one full-time position.

We add to finding 25 that in Forrestal's expert opinion it is not possible to acquire the skills necessary to interpret merely by growing up in a home with hearing-impaired parents.

The issue is whether the Board illegally discriminated against Politzer because of his Association activity. In re Bridgewater Tp. 95 N.J. 235 (1984), sets forth the test:

[T]he employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, U.S. , 103 S.Ct. [2469] at 2474, 76 L.Ed.2d [667] at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. [Id. at 242]

Our focus is on the decision not to hire Politzer for the second available full-time position. The decisions to (1) eliminate Politzer's part-time position and (2) offer Susan Eynon, who like Politzer had been part-time, the first vacant full-time position were motivated by legitimate business considerations. The decision to eliminate Politzer's part-time position was based on a department reorganization and did not violate the Act. Both part-time positions were eliminated and replaced by a full-time position. Nor do we believe that hiring Eynon rather than Politzer violated the Act. The full-time position was in an "academic" setting, where Eynon had been assigned. Although Politzer had received good recommendations, so had Eynon. Thus, we focus only on the decision not to hire Politzer for the second full-time position.

We agree with the Hearing Examiner that Politzer established that his protected activity motivated the decision not to offer him full-time employment. First, he engaged in protected activity -- he was in a leadership role during difficult and protracted negotiations. The Board, of course, was aware of this role and hostile towards it. There is direct evidence that it disapproved of his conduct: the Board's negotiator said Politzer was "an irritant...very outspoken and too demanding" and the District was "very unhappy with [his] behavior." Further, there is strong circumstantial evidence that this hostility motivated the Board not to offer Politzer full-time employment. Before Politzer engaged in protected activity, he had been solicited for full-time employment. Yet after he participated in negotiations, he was not

offered employment even though a position was available and he was qualified to fill the position. Further, the District applied different criteria when it hired Burns instead of Politzer. According to Newman, the District hired Eynon because she was familiar with the program and students and had good skills. If these criteria had been applied to the second position, Politzer would have been hired: he had worked in the program for three years, was familiar with the students, teachers and building and had received good to excellent performance evaluations. Yet the District hired a new employee.

Accordingly, we conclude that Politzer has proved by a preponderance of the evidence that his protected conduct motivated the District not to offer him full-time employment. The District's previous interest in hiring Politzer as a full-time interpreter, its disapproval of Politzer's conduct during negotiations, its disparate application of criteria in the two hiring decisions made after the negotiations, and the timing of the nonrenewal just after Politzer's involvement in difficult negotiations demonstrate that the District's decision was based on his protected activity.

The burden now shifts to the District to establish by a preponderance of the evidence that it would have taken the disputed personnel action even absent the protected activity. Bridgewater at 244. The Hearing Examiner found that the burden was met for two reasons: (1) Burns would provide a role model for students and (2) Newman, the decisionmaker, was free of the illegal taint. We have come to a different conclusion. First, it is doubtful that Burns

could be perceived as a role model for the hearing-impaired since she is not deaf but merely grew up with hearing-impaired parents. It is also evident that Politzer was more qualified than Burns. He was experienced, had been trained in the field, was familiar with the program and had earned good recommendations. Second, in view of the facts outlined above, we do not believe Newman's action was free of the taint. He departed from his earlier practice by not soliciting Politzer for full-time employment and he applied different criteria for Burns and Eynon. Accordingly, we find that the decision not to hire Politzer was motivated by his protected conduct and that the District failed to prove it would not have hired him absent that conduct.

ORDER

The Bergen County Special Services School District is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by not offering Walter Politzer full-time employment as a sign language interpreter in retaliation for his union activity.
2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by not offering Walter Politzer full-time employment as a sign language interpreter in retaliation for his union activity.

B. Take the following affirmative action:

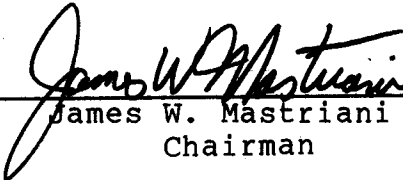
1. Offer Walter Politzer full-time employment as a sign language interpreter.

2. Make Walter Politzer whole for lost wages and other benefits he would have received had he been employed on a full-time basis in the 1986-1987 and 1987-1988 school years, plus interest pursuant to R. 4:42-11.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
March 18, 1988
ISSUED: March 21, 1988

NOTICE TO ALL EMPLOYEES**PURSUANT TO**

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by not offering Walter Politzer full-time employment as a sign language interpreter in retaliation for his union activity.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by not offering Walter Politzer full-time employment as a sign language interpreter in retaliation for his union activity.

WE WILL offer Walter Politzer full-time employment as a sign language interpreter.

WE WILL make Walter Politzer whole for lost wages and other benefits he would have received had he been employed on a full-time basis in the 1986-1987 and 1987-1988 school years, plus interest pursuant to R. 4:42-11.

Docket No. CO-87-22-82BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT
(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-16

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY SPECIAL
SERVICES SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CI-87-22-82

WALTER POLITZER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent District did not violate §§5.4(a)(1) and/or (3) of the New Jersey Employer-Employee Relations Act when it failed to offer full-time employment to Walter Politzer as an interpreter for the 1986-87 school year. Admittedly, Politzer had been active on behalf of the Association, which negotiates for the employees in the Respondent's unit, and that the District had manifested hostility toward him in negotiations. However, the Hearing Examiner concluded that the Respondent demonstrated that it had a legitimate business justification in preferring to hire another individual over Politzer for the 1987-86 school year and, thus, notwithstanding Politzer's having engaged in protected activities as to which the District was hostile, the actions of the Respondent in its hiring policy would have occurred even in the absence of Politzer's protected activities under Bridgewater.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-16

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY SPECIAL
SERVICES SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CI-87-22-82

WALTER POLITZER,

Charging Party.

Appearances:

For the Respondent
Gruen & Ritvo, Esqs.
(Charles A. Gruen, Esq.)

For the Charging Party
Oxfeld, Cohen, Blunda, Friedman,
LeVine & Brooks, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 3, 1986, and amended on December 11, 1986, by Walter Politzer (hereinafter the "Charging Party" or "Politzer") alleging that the Bergen County Special Services School District (hereinafter the "Respondent" or the "District") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that by letter dated April 16,

1986, the Respondent notified Politzer that he was not being renewed; that all of the Charging Party's evaluations have been good-to-excellent and that the reasons given for nonrenewal, "uncertainty involved in student enrollment and program needs," are pretextual; that Politzer was not renewed as reprisal for his having been the chief negotiator for the Education Association in long and acrimonious negotiations that ended in March 1986; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 12, 1987. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 13 and June 11, 1987, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by September 4, 1987.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Bergen County Special Services School District is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Walter Politzer is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Although not a party, the Bergen County Special Services School District Education Association (hereinafter the "Association") is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

4. Politzer began employment with the Respondent in September 1983 as a part-time sign language interpreter. He was never employed full time and received no benefits. He was employed in the High School vocational program and worked in the "Vo-Tech" building in Paramus. Another interpreter, Susan Eynon, who was hired after Politzer, worked in the academic program in Midland Park High School.

5. The collective negotiations agreement between the Respondent and the Association, effective July 1, 1985 through

June 30, 1988, was received in evidence as J-1. Politzer participated in the negotiations for J-1, having volunteered to do so in September 1984. By the second meeting of the Association in the negotiations leading to J-1, Politzer was designated as the spokesman for the Association.^{2/} The spokesman for the Respondent was Robert D. Gruen, Esq.

6. The prior collective negotiations agreement expired June 30, 1985, and the first negotiations meeting for the successor agreement occurred in October or November 1984. The negotiations ended some 16-18 months later and were considered by the parties as "the longest yet." Politzer attended all of the negotiations meetings on behalf of the Association. The Association also utilized the negotiating services of Mark Press, a part-time NJEA negotiations consultant, and John Biondi, a full-time NJEA representative. Press testified without contradiction that Politzer was the spokesman for the employees represented by the Association and that the negotiations were long and replete with animosity at the bargaining table. This will be amplified upon, infra.

^{2/} This fact is reinforced by the Association's memo to the Respondent on November 21, 1984, when the Association advised the Respondent that Politzer would be its "contact person" for the 1985-86 school year (CP-1). Also, on December 10, 1984, the Respondent advised Politzer who the members of its negotiating team would be (CP-2). See also, CP-3, p. 2. On November 25, 1985, Superintendent James B. Lederer thanked Politzer for his participation in the negotiations (CP-4). Finally, John E. Dwyer, Jr., the Business Administrator, acknowledged that Politzer was the Association's spokesman and that the negotiations were the longest yet.

7. The Charging Party's proofs established beyond doubt that Politzer was active in the negotiations and was a spokesman along with Press and Biondi. Although no job action ultimately took place, the members of the Association voted in September 1985, for a job action and a date was ultimately set for February 1986. However, following a 24-hour negotiations session in February 1986, a two-page memorandum of agreement was signed with salary guides to be agreed upon.

8. The number of steps on the guide was at all times an issue in negotiations with the Association wanting to reduce the number of steps and the District initially resisting this effort but then agreeing to it. Thus, it was agreed at the 24-hour negotiations session in February 1986, supra, that the number of the steps would be reduced from 16 to 12.

9. Lederer, the Respondent's Superintendent, supra, called Politzer to a meeting in his office in the latter part of February 1986 where Irma Leeds, the Administrative Assistant, Dwyer, the Business Administrator, supra, and Theodore F. Swartz, the Assistant Superintendent, were present. Lederer told Politzer that the District would not approve the guides in their present form, supra. Politzer did not raise any argument at that time. Lederer suggested to Politzer that he take the guides back and put in some

"phantom steps." Politzer said that he would take this back to the Association.^{3/}

10. After having left the meeting with Lederer et al., supra, Politzer advised Biondi and the Association's negotiations committee of what had transpired. Politzer thereafter met twice with the Superintendent and his staff and then came the "ultimate" meeting with the Respondent and the Association and a mediator. Although the date is not fixed in the record, it apparently was sometime in February 1986. At this meeting there was a total resolution of the salary guide issue.^{4/}

11. The Charging Party adduced the following proofs with respect to animus manifested toward Politzer by the Respondent in the negotiations,^{5/} which were concluded in February 1986 and embodied in the collective negotiations agreement, effective July 1, 1985 through July 30, 1988 (J-1): Press testified without contradiction that Robert Gruen, the Board's attorney, indicated to Press that "...the Board was very unhappy with the behavior of Mr.

^{3/} Biondi testified without contradiction that Politzer refused to accept the "phantom steps," i.e., the three additional steps in the salary guide.

^{4/} J-1 was executed by the parties on February 13 and February 26, 1986, respectively.

^{5/} These proofs were adduced on rebuttal and, thus, they were not before the Hearing Examiner at the time of the Respondent's motion to dismiss at the conclusion of the Charging Party's case. It was for this reason that no scintilla of evidence of animus existed on the record at the time and it was so noted (1 Tr 121-126).

Politzer..." (2 Tr 63) and, also, Gruen stated "...he (Politzer) was an irritant and...very outspoken and too demanding..." (2 Tr 64). Further, Press testified without contradiction that Leeds stated: "If Walter Politzer were not there, things would be running a lot smoother..." (2 Tr 64). Finally, Press testified that the negotiations were long and drawn out and were conducted with "animosity" on the part of both parties (2 Tr 65, 66).

12. The Respondent's proofs regarding the absence of animus toward Politzer was that Dwyer testified that there was no retaliation against Politzer for his conduct in negotiations on the part of the Board and that Joan Kringle, a secretary for the Board for nine years and an Association participant in the 1985 contract negotiations, testified that she detected no animosity by the District toward Politzer, notwithstanding that she acknowledged that Politzer was the spokesman for the Association in the 1985 negotiations.

13. James R. Newman, the Program Director for Elementary and Secondary Education for the Hearing Impaired, supervised Politzer and Eynon. In the 1985-86 school year he supervised six full-time and two part-time interpreters and in the 1986-87 school year he supervised seven full-time interpreters, there being no part-time interpreters, infra. Newman's evaluations and observations of Politzer were received in evidence as Exh. CP-5 through CP-10. An examination of these documents indicates that the performance of Politzer between February 29, 1984 and February 27,

1986, were uniformly good to excellent. The testimony of Newman was that his evaluations of Politzer were "good." On the other hand, Eynon, who was also a part-time interpreter during this period, was evaluated by Newman as "very good," notwithstanding that her evaluations were not introduced in evidence. Newman, in comparing Politzer with Eynon, testified that her skills were "better."

14. On March 31, 1986, Superintendent Lederer sent Politzer a letter, advising him that "Because of the uncertainties regarding enrollment for the 1986-87 school year...we are sorry to inform you that the Board will be reviewing a recommendation not to offer a contract to you for the 1986-87 school year..." (CP-11). Newman testified that Eynon was sent a like letter and although this letter was not offered in evidence it clearly was sent. On April 3, 1986, Politzer wrote to Newman, expressing his interest in working full-time, beginning in September 1986 (CP-12).

15. In September 1983, when Politzer initially applied for part-time employment as an interpreter, he was asked if he wished to work full-time and replied in the negative. Politzer reiterated this position in September 1984 and his position did not change until he made a request for a full-time position in April 1986, supra. Newman's acknowledgement to Politzer (CP-12, supra) was his thanks for Politzer's showing of interest. However, Politzer never formally received a response to his April 3rd letter to Newman, supra.

16. On April 16, 1986, Dwyer sent a letter to Politzer, advising him that he would not be reemployed for the 1986-87 school year "...because of uncertainties involved with enrollment and program needs..." (CP-14). Politzer testified that although he did not know what "uncertainties, etc." meant Newman had stated to him in March 1986 that he did not know what his staffing requirements would be.

17. On April 22, 1986, Politzer wrote to Dwyer requesting that the District give him reasons for its action (CP-15). On April 28, 1986, Dwyer wrote to Politzer, stating that the reason for the District's action was because of the "uncertainty involved in student enrollment and program needs" (CP-16).

18. Newman testified at length and without contradiction regarding the reorganization of the hearing impaired program for the 1986-87 school year and its impact on staffing needs (1 Tr 154-160). The reorganization was to take place at both the elementary and high school levels, involving 60 students at the elementary level who were to be consolidated from three school sites to two school sites, the high school students remaining in the same places, namely, Midland Park High School for those on the academic track and the Vocational School in Paramus for those on the vocational track (1 Tr 154, 155).

19. During the 1985-86 school year, Eynon was employed as a part-time interpreter in the academic program at Midland Park High School. Politzer was like employed as a part-time interpreter at the Vocational School in Paramus (2 Tr 17, 18).

20. As a result of the reorganization for the 1986-87 school year, supra, it was determined by Newman and the administration that instead of two part-time interpreters there would be one full-time interpreter. The number of full-time interpreters required depended upon the student enrollment both from within the district and from without (1 Tr 157-159). Because a full-time interpreter had resigned toward the end of the 1985-86 school year, there was an immediate need for a full-time interpreter to replace that person (1 Tr 158-160). Because of this need, administration representatives and Newman interviewed Politzer and Eynon in May 1986. Politzer's interview was conducted by Swartz, who does not "sign." According to Politzer, Swartz conducted a standard interview lasting about 45 minutes (1 Tr 75-79). Politzer was told that he would be interviewed a second time by Newman, and this occurred within about a week (1 Tr 79). At his interview with Newman, Politzer was put through basic tests to see if he could sign, notwithstanding that he had been in the District for three years, Newman, when asked by Politzer if he had the job, said "...We'll let you know..." (1 Tr 80). Politzer never received a "yes or no" from Newman or the administration (1 Tr 81). Thereafter, on July 13, 1986, Politzer saw an advertisement in the "Star Ledger" for an interpreter position (CP-17).

21. Newman testified that he also interviewed Eynon in May 1986 for the full-time interpreter position for the 1986-87 school year (1 Tr 161). Newman testified that he recommended Eynon for the

position over Politzer and that this was based on her part-time experience in the academic track at the Midland Park High School, that she knew the students and the teachers involved and, finally, that he felt "...she was more skilled..." (1 Tr 161).^{6/}

22. Newman also testified that the need for interpreters was determined in large part by the actual enrollment of students, notwithstanding earlier projections, and that in the summer of 1986 it became clear that there was a need for additional interpreting services (1 Tr 157-159). Thus, after the reorganization, and after the student enrollment needs were ascertained, the administration decided to employ a second full-time interpreter in July 1986 (2 Tr 23). At this time Newman considered for full-time employment Politzer and one Elizabeth Burns. Newman did not request a second interview of Politzer because of the previous interview in May (2 Tr 23, 24) and, thus, Newman interviewed only Burns (1 Tr 160). Although the second full-time interpreting position was to be in the vocation program at Paramus where Politzer had previously been employed in a part-time capacity, Newman testified that he hired Burns because of her skill level and because her parents were hearing impaired. He also testified credibly that she was fluent in a variety of modes of communication in sign language and would "...provide a role model for the students..." (1 Tr 162, 163). Newman reinforced this testimony on cross-examination (2 Tr 25, 26).

^{6/} Newman had earlier testified that Politzer had only interpreted in the vocational program and had no experience in the academic program (1 Tr 156).

23. Newman testified that he interviewed Burns on September 17, 1986 and that he recommended her for hiring on that date (CP-22), notwithstanding she had not completed the Union County College program such as had Eynon (2 Tr 15, 16), and that she had no undergraduate education nor any certification in a special area (2 Tr 28). Newman testified credibly that it was not uncommon for an applicant such as Burns to be interviewed on a date such as July 17, 1986, and then to file a formal job application at a later such as was done here by Burns on July 24, 1986 (2 Tr 30, 31; CP-21). Burns was originally placed in the academic program at Midland Park High School but, shortly thereafter, Newman testified that Burns' position "...evolved into the vocational position..." at Paramus (2 Tr 33).

24. The Charging Party offered as a witness Eileen Forestal, an Associate Professor and coordinator for interpreters for the deaf program at Union County College. It was stipulated that she was an expert in the area of training and the use of interpreters in the educational environment (2 Tr 45, 46). Forestal testified that both Eynon and Politzer took the same program at the College, and that there was no essential difference between the programs that they took (2 Tr 46).

25. Forestal testified at some length regarding the qualifications of interpreters whose experience derives from interpreting for deaf parents or others in a household (2 Tr 47, 48). Forestal's conclusion was that interpreting for deaf parents

would not make that interpreter a "professional interpreter" (2 Tr 47, 48). Forestal acknowledged on cross-examination that she was not familiar with the needs of the Respondent for the 1986-87 school year or the training that takes place among interpreters once hired by the Respondent (2 Tr 55-57).

DISCUSSION AND ANALYSIS

The Respondent Did Not Violate The Act As Alleged Because It Established A Legitimate Business Justification Defense Under The Second Part Of The Bridgewater Analysis.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in pretext/sham and "dual motive" cases, involving an alleged violation of §8(a)(1) or §8(a)(3) of the National Labor Relations Act.^{7/}

In a "dual motive" case such as is involved herein, the Wright Line and Bridgewater decisions set forth the following requisites in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to fail to rehire as in the case of Politzer; and (2) once this is established, the employer has the

^{7/} The United States Supreme Court subsequently approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242), i.e., the employer must establish a legitimate business justification for its action.

The Court in Bridgewater further refined the above test in "dual motive" cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (see 95 N.J. at 246).^{8/} Finally, as in any case involving alleged discrimination, the Charging Party must establish a causal connection or nexus between the exercise of the protected activity and the employer's conduct in response thereto: see Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

Initially, the Hearing Examiner has no difficulty in concluding that Politzer has met the first part of the Bridgewater analysis. First, he clearly engaged in significant protected activity as the lead negotiator for the employees represented by the Association in the negotiations leading to the July 1, 1985 through June 30, 1988 collective negotiations agreement (J-1). Politzer's

^{8/} The Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action" (95 N.J. at 242).

activities in these negotiations covered a substantial period of time from sometime in October or November 1984 through February 1985 (see Findings of Fact Nos. 5-10, supra). Obviously, this activity in negotiations by Politzer on behalf of the Association was necessarily known to the employer through the various face-to-face meetings plus the exchange of correspondence, supra. Thus, the engaging in protected activity and the employer knowledge aspects of Bridgewater are satisfied.

The next inquiry is whether or not the Respondent District manifested hostility or anti-union animus towards Politzer, which, if present, would satisfy the requirement that there be evidence adduced by the Charging Party to support an inference that Politzer's protected activity was a "substantial" or a "motivating" factor in the Respondent's decision not to employ him for the 1986-87 school year. As found in Finding of Fact No. 11, supra, the Charging Party adduced significant proofs, which lead the Hearing Examiner to conclude that the Respondent manifested animus and hostility toward Politzer in the negotiations which concluded in February 1986. First, Press testified without contradiction that the Respondent's attorney indicated to him that the District was "very unhappy with the behavior of Mr. Politzer" and also that Politzer was "an irritant and...very outspoken and too demanding." Press testified further and to the same effect regarding a statement by Leeds, coupled with Press' own opinion that the negotiations were conducted with "animosity" on the part of both parties.

Considering all of the above, the Hearing Examiner has no difficulty in concluding that there was a causal nexus between Politzer's exercise of protected activity as an Association negotiator over a period of 16 months and the Respondent's conduct in response thereto, namely, failing to rehire Politzer as a full-time interpreter during the 1986-87 school year. Thus, does the Hearing Examiner find and conclude that the Charging Party has fully satisfied the first part of the Bridgewater test, supra.

We now proceed to the heart of the matter, namely, has the Respondent proven by a preponderance of the evidence that it had a legitimate business justification in reaching its decision not to rehire Politzer for the 1986-87 school year. In other words, quoting the second portion of the Bridgewater, supra, test, has the Respondent demonstrated "...by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity..." (95 N.J. at 242).

The Hearing Examiner finds and concludes that the Respondent has met its burden of demonstrating by a preponderance of the evidence that it would not have rehired Politzer for the 1986-87 school year, notwithstanding the fact that Politzer had engaged in the protected activity set forth above. In so concluding, the Hearing Examiner is aware of Politzer's activity in negotiations on behalf of the Association and the hostility manifested for Politzer in statements by Gruen and Leeds as set forth in the Finding of Fact No. 11, supra.

First, it is clear that the Respondent's decision to terminate Politzer's services as a part-time interpreter was as the result of a legitimate reorganization of the hearing impaired program for the 1986-87 school year (see Finding of Fact No. 18, supra). Under Court and Commission precedent, the impact of a managerial decision to reorganize is insulated from a finding that an unfair practice was committed: for example, see Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973); Twp. of Nutley, P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985); Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983); Tenafly Bd. of Ed., P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983) and Point Pleasant Boro Bd. of Ed., P.E.R.C. No. 81-145, 6 NJPER 299 (¶11142 1980).

There appears to be no question that in the hiring of Susan Eynon as a full-time interpreter for the 1986-87 school year that the Respondent was not illegally motivated. Eynon's skills, according to Newman, were superior to those of Politzer plus the other factors set forth in Finding of Fact No. 21, supra. However, the closer question is whether or not the Respondent was illegally motivated when the administration decided to hire Elizabeth Burns as the second full-time interpreter for the 1986-87 school year rather than Politzer.

Here, the Hearing Examiner is confronted with the testimony of Forestal that an individual such as Burns, whose qualifications largely derived from growing up in a hearing impaired environment,

were insufficient to offset the qualifications of Politzer. However, it must be recalled that Newman, who impressed the Hearing Examiner as a witness whose role in the hiring process was without illegal taint, insisted that, in preferring Burns over Politzer, he selected an individual who, notwithstanding any questions about her qualifications, would "provide a role model for the students." To Newman, this was sufficient reason for him to prefer Burns over Politzer in the hiring process. Further, the reason for Newman's preferring Burns over Politzer appears to be neutral and without taint.

There appearing to be no evidence of discriminatory intent on the part of Newman or others in administration toward Politzer, the Hearing Examiner must necessarily come down on the side of the Respondent in the selection of Burns over Politzer. Thus, the Hearing Examiner will recommend that the Respondent did not violate §§5.4(a)(1) and/or (3) of the Act when the administration, led by Newman, recommended that Elizabeth Burns be hired as a full-time interpreter for the 1986-87 school year rather than Walter Politzer.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it hired Elizabeth Burns as a full-time interpreter for the 1986-87 school year and failed to rehire Walter Politzer for the same position.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: September 30, 1987
Trenton, New Jersey